

BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

<i>In the Matter of</i>	)	
	)	CG Docket No. 02-278
Petition of Healthways, Inc. and	)	CG Docket No. 05-338
Healthways WholeHealth Networks, Inc.	)	
For Retroactive Waiver of	)	
47 C.F.R. § 64.1200(a)(4)(iv)	)	

**COMMENT OF AFFILIATED HEALTH CARE ASSOCIATES, P.C. TO PETITION OF  
HEALTHWAYS, INC. AND HEALTHWAYS WHOLEHEALTH NETWORKS, INC.**

The petition for retroactive waiver filed by Healthways, Inc. (“Healthways”) and Healthways WholeHealth Networks, Inc. (“WholeHealth”)(collectively, “Petitioners”) is abusive and should be denied.

Petitioners seek a retroactive waiver of the opt-out requirement with respect to solicited advertising faxes. (Petition, p. 2) Petitioners claim that they are similarly situated to prior petitioners who were granted retroactive waivers because they raise an affirmative defense in class action lawsuits alleging TCPA violations “that the alleged recipients of the faxes at issue – who are members of the network managed by WholeHealth Networks – provided their prior express invitation or permission to receive such faxes.” (Petition, pp. 5-6); Appendix A, WholeHealth’s Answer and Affirmative Defenses, p. 21, ¶ 4. However, Petitioners do not substantiate their alleged defense of consent.

Petitioners claim that plaintiff, Affiliated Health Care Associates, P.C. (“Plaintiff”) and/or members of the putative class provided express permission or invitation to receive its faxes by completing an application to become part of its healthcare network. (Petition, p. 2) WholeHealth argues that it regularly communicates with its network members by fax “regarding

the practitioners' participation in the network, their provision of health services, and other aspects of the ongoing relationships between WholeHealth Networks and the network members.” (Petition, p.. 2)

Plaintiff's complaint alleges that WholeHealth sent it unsolicited fax advertisements on August 13, 2014 and August 20, 2014. In addition, Plaintiff alleges that the faxes do not contain an opt out notice in the form required by 47 U.S.C. § 227. Plaintiff is not a member of the WholeHealth network.<sup>1</sup>

Petitioners fail to supply any basis for their assertions that the faxes they sent were “solicited” or that they obtained “prior express permission” from anyone, including plaintiff. Petitioners do not attach a declaration supporting their arguments that the alleged junk faxes were sent with prior express invitation or permission. Rather, the petition describes a potential business relationship, “Healthways’ customers” or “practitioners who have elected to the [WholeHealth] network”, and not advertising faxes sent with the express consent of the recipient. (Petition, p. 2)

However, the waiver contemplated by the FCC does not extend to faxes sent in the context of an established business relationship. Rather, because the Commission's notice of intent to adopt Section 64.1200(a)(4)(iv) “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent *with prior express invitation or permission of the recipient*,” such retroactive waivers should only be considered in those instances involving prior express invitation or permission where there is some evidence that the petitioner misunderstood and, as the FCC provided, **not** in instances involving established business

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<sup>1</sup> Plaintiff only named WholeHealth as a defendant.

relationships or “customers.”

The Commission has repeatedly held that the business claiming consent or an established business relationship has the burden of proof. “[A] sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient's prior express invitation or permission.” *In re: Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, at 3812, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006). The FCC has consistently adhered to this position. *Virtual Auto Loans*, EB-09-TC-230, 2009 FCC LEXIS 4342 (March 9, 2009); *New York Security and Private Patrol, Inc.*, EB-09-TC-231, 2009 FCC LEXIS 4343 (March 9, 2009).

Courts have also followed this rule and placed the burden of proof on the sender of the communication. *Gutierrez v. Barclays Group*, 10cv1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, 2011 WL 579238, at \*2 (S.D. Cal. Feb. 9, 2011); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, 1:10-cv-253, 2012 WL 4074620, 2012 U.S. Dist. LEXIS 85663 (W.D.Mich., June 21, 2012); *Green v. Service Master on Location Servs. Corp.*, 07 C 4705, 2009 WL 1810769, 2009 U.S. Dist. LEXIS 53297 (N.D. Ill. June 22, 2009); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, \* 3-4, 2008 U.S. Dist. LEXIS 41766 (N.D. Ill. May 27, 2008) (observing that issue of consent is an affirmative defense); *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152 (N.D. Ill. 2009) (finding that consent did not exist with respect to the class because the TCPA allocates the burden of obtaining consent on the senders of unsolicited faxes, rather than requiring recipients to “opt-out”); *Lampkin v. GGH, Inc.*, 2006 OK CIV APP 131, 146 P.3d 847, ¶27 (Okla. Ct. App. 2006) (recipient should not be charged with proving the negative

propositions that it did not give permission or did not have a business relationship with sender).

This is consistent with the general rule that the party claiming the benefit of an exception in a federal statute, and the party who logically would have evidence of consent or an established business relationship, has the burden of coming forward with at least some evidence of the applicability of these exceptions. *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1429-30 (7th Cir. 1996); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S. Ct. 2395, 2400, 171 L. Ed. 2d 283 (2008) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D. Cal. 1999).

Here, Petitioners offer absolutely nothing to substantiate that anyone consented to receiving advertising faxes sent by them or on their behalf. Moreover, “consent” under the TCPA does not mean merely providing your contact information, *i.e.*, your fax number, on a network provider agreement. “Express permission to receive a faxed ad requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 18 F.C.C.R. 14014, ¶ 193 (2003).

Affiliated Health Care Associates, P.C. denies giving consent to WholeHealth. (Affidavit of Irene Slusarenko, Appendix B). The faxes seek to establish a relationship with the recipient by selling the product and/or service, ProMailSource, a secure email service and system, to healthcare providers. At least one of the faxes attached to plaintiff’s complaint is not specifically addressed to any person, which would normally be the case if consent to send it had been

obtained. In short, the faxes have every indication of a “blast fax” sent without consent or an established business relationship.

In addition, Petitioners do not state why they “believed” their faxes did not require an opt out notice. There is nothing in the petition to indicate that Petitioners read or relied on the Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), or Junk Fax Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006), prior to sending its junk faxes. There is also no evidence that Petitioners misunderstood anything about their obligation to include an opt-out notice. There is no opt out notice of any kind on the junk faxes attached to plaintiff’s complaint. “We emphasize, however, that simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.” (FCC 14-164, at ¶ 26)

Finally, Petitioners do not give any indication of their financial resources or potential liability in plaintiff’s case. Instead, Petitioners only state that “Absent a waiver, Petitioner could be subjected to substantial statutory damages.” (Petition, p. 6) In its answer, WholeHealth admitted that it transmitted faxes to at least “40 health services practitioners in its network who are located in Illinois.” but denied that numerosity was satisfied. (Appendix A, ¶¶ 19, 29, 46, 60, 73, 86) On this record, WholeHealth may be liable for a maximum of \$60,000 (40 faxes x \$1,500 per fax). Healthways is a publicly traded corporation and this petition is disclosed in its 10-K report. WholeHealth is a subsidiary of Healthways. Petitioners’ financial statements show that \$60,000 is not a drain on its financial resources.

The only thing Petitioners have in common with the prior petitioners is that they are defendants in TCPA class actions. That fact alone is insufficient to grant a retroactive waiver.

On this record, no action by the Commission is warranted. There are no special circumstances to warrant a deviation from the general rule and a waiver would not serve the public interest. Healthways and WholeHealth's petition should be stricken and/or denied. The petition is nothing more than a baseless attempt to complicate an enforcement action by the recipient of unsolicited advertising faxes.

Respectfully submitted,

s/ Daniel A. Edelman

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# **APPENDIX A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

AFFILIATED HEALTH CARE	)	
ASSOCIATES, P.C.,	)	
on behalf of plaintiff and	)	
the class members defined herein,	)	Case No. 1:14-cv-10247
	)	
	)	Hon. Virginia M. Kendall
Plaintiff,	)	
	)	
v.	)	
	)	
MEDVERSANT TECHNOLOGIES, LLC,	)	
and HEALTHWAYS WHOLEHEALTH	)	
NETWORKS, INC., and JOHN DOES 1-10	)	
	)	
Defendants.	)	

**ANSWER AND AFFIRMATIVE DEFENSES**

Defendant Healthways WholeHealth Networks, Inc. (“WholeHealth Networks”), for its answer and affirmative defenses to the complaint of plaintiff Affiliated Health Care Associates, P.C., states as follows:

1. Plaintiff Affiliated Health Care Associates, PC, brings this action to secure redress for the actions of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., in sending or causing the sending of unsolicited advertisements to telephone facsimile machines in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”), the Illinois Consumer Fraud Act, 815 ILCS 505/2 (“ICFA”), and the common law.

**ANSWER:** WholeHealth Networks admits that plaintiff purports to bring this action to “secure redress” for purported violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the “TCPA”), the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* (the “ICFA”), and the common law. WholeHealth Networks denies that it violated those statutes or the common law, denies that plaintiff is entitled to any relief, and denies the remaining allegations of Paragraph 1.



2. The TCPA expressly prohibits unsolicited fax advertising. Unsolicited fax advertising damages the recipients. The recipient is deprived of its paper and ink or toner and the use of its fax machine. The recipient also wastes valuable time it would have spent on something else. Unsolicited faxes prevent fax machines from receiving and sending authorized faxes, cause wear and tear on fax machines, and require labor to attempt to identify the source and purpose of the unsolicited faxes.

**ANSWER:** The first sentence of Paragraph 2 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks states that the TCPA speaks for itself, and denies plaintiff's characterization thereof. WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 2.

### **PARTIES**

3. Plaintiff Affiliated Health Care Associates, PC, is a professional corporation with offices at 2229 W. Chicago Avenue, Chicago, Illinois 60622, where it maintains telephone facsimile equipment.

**ANSWER:** WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3.

4. Defendant Medversant Technologies, LLC, is a California limited liability company. Its registered agent and office is Matthew Haddad, 355 S. Grand Avenue, Suite 1700, Los Angeles, California 90071.

**ANSWER:** WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4.

5. Defendant Healthways WholeHealth Networks, Inc., is [a] Delaware corporation with its principal place of business at 701 Cool Springs Blvd., Franklin, Tennessee 37067. Its registered agent and office is National Registered Agents Inc., 4701 Cox Road, Suite 285, Glen Allen, Virginia 23060.

**ANSWER:** WholeHealth Networks admits that it is a Delaware corporation, that its principal place of business is 701 Cool Springs Blvd., Franklin, Tennessee 37067, and

that its registered agent is National Registered Agents, Inc. WholeHealth Networks denies the remaining allegations of Paragraph 5.

6. Defendants John Does 1-10 are other natural or artificial persons that were involved in the sending of the facsimile advertisements described below. Plaintiff does not know who they are.

**ANSWER:** WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6.

### **JURISDICTION & VENUE**

7. This Court has jurisdiction under 28 U.S.C. §§1331 and 1367. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751-53 (2012); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7111 Cir. 2005).

**ANSWER:** Paragraph 7 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks admits that this Court has federal subject matter jurisdiction over this action. WholeHealth Networks denies the remaining allegations of Paragraph 7.

8. Personal jurisdiction exists under 735 ILCS 5/2-209, in that defendants:

- a. Have committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.
- b. Have transacted business in Illinois.

**ANSWER:** Paragraph 8 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks admits that it has transacted business in Illinois, and that this Court has personal jurisdiction over WholeHealth Networks. WholeHealth Networks denies the remaining allegations of Paragraph 8.

9. Venue in this District is proper for the same reason.

**ANSWER:** Paragraph 9 consists of legal conclusions to which no response is required. To the extent a response is required, WholeHealth Networks admits that venue is proper in this Court. WholeHealth Networks denies the remaining allegations of Paragraph 9.

**FACTS**

10. On August 13, 2014, plaintiff Affiliated Health Care Associates, PC, received the unsolicited fax advertisement attached as Exhibit A on its facsimile machine.

**ANSWER:** WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 10.

11. On August 20, 2014, plaintiff Affiliated Health Care Associates, PC, received the unsolicited fax advertisement attached as Exhibit B on its facsimile machine.

**ANSWER:** WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11.

12. Discovery may reveal the transmission of additional faxes as well.

**ANSWER:** WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12.

13. Defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., are responsible for sending or causing the sending of the faxes.

**ANSWER:** WholeHealth Networks admits, on information and belief, that defendant Medversant Technologies, LLC (“Medversant”) transmitted to plaintiff the faxes attached to plaintiff’s complaint. WholeHealth Networks denies the remaining allegations of Paragraph 13.

14. Defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., as the entities whose products or services were advertised in the faxes, derived economic benefit from the sending of the faxes.

**ANSWER:** WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegation that Medversant derived economic benefit from transmitting faxes to plaintiff. WholeHealth Networks denies the remaining allegations of Paragraph 14.

15. Defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., either negligently or willfully violated the rights of plaintiff and other recipients in sending the faxes.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 15.

16. Plaintiff had no prior relationship with defendants and had not authorized the sending of fax advertisements to plaintiff.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 16.

17. The faxes do not contain an “opt out” notice in the form required by 47 U.S.C. § 227.

**ANSWER:** WholeHealth Networks admits, on information and belief, that the faxes that are attached to plaintiff’s complaint do not contain an “opt-out” notice in the form described in 47 C.F.R. § 64.1200(a)(4)(iv). WholeHealth Networks denies the remaining allegations of Paragraph 17.

18. On information and belief, the faxes attached hereto were sent as part of a mass broadcasting of faxes.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 18.

19. On information and belief, defendants have transmitted similar unsolicited fax advertisements to at least 40 other persons in Illinois.

**ANSWER:** WholeHealth Networks admits, on information and belief, that it transmitted similar faxes to at least 40 health services practitioners in its network who are located in Illinois. WholeHealth Networks denies the remaining allegations of Paragraph 19.

20. There is no reasonable means for plaintiff or other recipients of defendants unsolicited advertising faxes to avoid receiving illegal faxes. Fax machines must be left on and ready to receive the urgent communications authorized by their owners.

**ANSWER:** WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 20.

### **COUNT I – TCPA**

21. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** WholeHealth Networks restates and incorporates its answers to Paragraphs 1 through 20.

22. The TCPA makes unlawful the “use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine . . .” 47 U.S.C. §227(b)(1)(C).

**ANSWER:** Paragraph 22 consists of legal conclusions to which no response is required. To the extent a response is required, WholeHealth Networks responds that the TCPA speaks for itself, and denies plaintiff’s characterization thereof. WholeHealth Networks denies the remaining allegations of Paragraph 22.

23. The TCPA, 47 U.S.C. §227(b)(3), provides:

Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State –

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

**ANSWER:** Paragraph 23 consists of legal conclusions to which no response is required. To the extent a response is required, WholeHealth Networks responds that the TCPA

speaks for itself, and denies plaintiff's characterization thereof. WholeHealth Networks denies the remaining allegations of Paragraph 23.

24. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result. Furthermore, plaintiff's statutory right of privacy was invaded.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 24.

25. Plaintiff and each class member is entitled to statutory damages.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 25.

26. Defendants violated the TCPA even if their actions were only negligent.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 26.

27. Defendants should be enjoined from committing similar violations in the future.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 27.

### **CLASS ALLEGATIONS**

28. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons and entities with fax numbers (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. §1658), (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** WholeHealth Networks admits that plaintiff purports to bring Count I on behalf of the putative class described in Paragraph 28. WholeHealth Networks denies the remaining allegations of Paragraph 28.

29. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 29 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 29.

30. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. The manner in which defendant compiled or obtained their list of fax numbers;
- c. Whether defendant thereby violated the TCPA;
- d. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- e. Whether defendant thereby converted the property of plaintiff.
- f. Whether defendant thereby created a private nuisance.
- g. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 30 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 30.

31. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 31 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 31.

32. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

**ANSWER:** Paragraph 32 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 32.

33. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 33 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 33.

34. Several courts have certified class actions under the TCPA. *Holtzman v. Turza*, 08 C 2014, 2009 U.S. Dist. LEXIS 95620 (N.D.111., Oct. 14, 2009), aff'd in relevant part, 728 F.3d 682 (7th Cir. 2013); *Sadowski v. Medi Online, LLC*, 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D. Ill. May 27, 2008); *CE Design Ltd. v Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D. Ill. 2009); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D. Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.*, 10 C 1315, 2010 U.S. Dist. LEXIS 108339, 2010 WL 4074379 (N.D. Ill. Oct. 12, 2010); *Hinman v. M & M Rental Ctr.*, 545 F.Supp. 2d 802 (N.D. Ill. 2008); *Clearbrook v. Roojlifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 72902 (N.D. Ill. July 20, 2010) (Cox, M.J.); *G.M Sign, Inc. v. Group C Communs., Inc.*, 08 C 4521, 2010 U.S. Dist. LEXIS 17843 (N.D. Ill. Feb. 25, 2010); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D. Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.*, 961 So.2d 451, 455 (La. App. 1st Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1st Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. (App.) 94, 50 P.3d 844 (2002); *Core Funding Group, LLC v. Young*, 792 N.E.2d 547 (Ind. App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285; 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns. Inc.*, 306 S.W.3d 577 (Mo. App. 2010).

**ANSWER:** Paragraph 34 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks admits that courts have granted class certification in TCPA actions, and have denied class certification in TCPA cases, and states that the cases cited in Paragraph 34 speak for themselves. WholeHealth Networks denies the remaining allegations of Paragraph 34.



35. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 35.

**COUNT II – ILLINOIS CONSUMER FRAUD ACT**

36. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** WholeHealth Networks restates and incorporates its answers to Paragraphs 1 through 20 herein.

37. Defendants engaged in unfair acts and practices, in violation of ICFA § 2, 815 ILCS 505/2, by sending unsolicited fax advertising to plaintiff and others.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 37.

38. Unsolicited fax advertising is contrary to the TCPA and also Illinois law. 720 ILCS 5/26-3(b) makes it a petty offense to transmit unsolicited fax advertisements to Illinois residents.

**ANSWER:** Paragraph 38 consists of legal conclusions to which no response is required. To the extent a response is required, WholeHealth Networks states that the TCPA and 720 ILCS 5/26-3(b) speak for themselves, and denies plaintiff's characterizations thereof. WholeHealth Networks denies the remaining allegations of Paragraph 38.

39. Defendants engaged in an unfair practice by engaging in conduct that is contrary to public policy, unscrupulous, and caused injury to recipients of their advertising.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 39.

40. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 40.

41. Defendants engaged in such conduct in the course of trade and commerce.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 41.

42. Defendant's conduct caused recipients of their advertising to bear the cost thereof. This gave defendant an unfair competitive advantage over businesses that advertise lawfully, such as by direct mail. For example, an advertising campaign targeting one million recipients would cost \$500,000 if sent by U.S. mail but only \$20,000 if done by fax broadcasting. The reason is that instead of spending \$480,000 on printing and mailing his ad, the fax broadcaster misappropriates the recipients' paper and ink. "Receiving a junk fax is like getting junk mail with the postage due". Remarks of Cong. Edward Markey, 135 Cong Rec E 2549, Tuesday, July 18, 1989, 101st Cong. 1st Sess.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 42.

43. Defendant's shifting of advertising costs to plaintiff and the class members in this manner makes such practice unfair. In addition, defendant's conduct was contrary to public policy, as established by the TCPA and Illinois statutory and common law.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 43.

44. Defendants should be enjoined from committing similar violations in the future.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 44.

### **CLASS ALLEGATIONS**

45. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons and entities with Illinois fax numbers (b) who, on or after a date three years prior to the filing of this action, (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** WholeHealth Networks admits that plaintiff purports to bring Count II on behalf of the putative class described in Paragraph 45. WholeHealth Networks denies the remaining allegations of Paragraph 45.

46. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 46 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 46.

47. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 47 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 47.

48. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 48 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 48.

49. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

**ANSWER:** Paragraph 49 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 49.

50. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of

separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 50 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 50.

51. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 51.

### **COUNT III – CONVERSION**

52. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** WholeHealth Networks restates and incorporates its answers to Paragraphs 1 through 20.

53. By sending plaintiff and the class members unsolicited faxes, defendant converted to their own use ink or toner and paper belonging to plaintiff and the class members.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 53.

54. Immediately prior to the sending of the unsolicited faxes, plaintiff and the class members owned and had an unqualified and immediate right to the possession of the paper and ink or toner used to print the faxes.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 54,

55. By sending the unsolicited faxes, defendant appropriated to their own use the paper and ink or toner used to print the faxes and used them in such manner as to make them unusable. Such appropriation was wrongful and without authorization.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 55.

56. Defendants knew or should have known that such appropriation of the paper and ink or toner was wrongful and without authorization.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 56.

57. Plaintiff and the class members were deprived of the paper and ink or toner, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of receipt of the unsolicited faxes.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 57.

58. Defendants should be enjoined from committing similar violations in the future.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 58.

### **CLASS ALLEGATIONS**

59. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons and entities with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** WholeHealth Networks admits that plaintiff purports to bring Count III on behalf of the putative class described in Paragraph 59. WholeHealth Networks denies the remaining allegations of Paragraph 59.

60. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 60 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 60.

61. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;

- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 61 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 61.

62. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff s counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 62 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 62.

63. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

**ANSWER:** Paragraph 63 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 63.

64. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 64 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 64.

65. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 65.

**COUNT IV – PRIVATE NUISANCE**

66. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** WholeHealth Networks restates and incorporates its answers to Paragraphs 1 through 20.

67. Defendant's sending plaintiff and the class members unsolicited faxes was an unreasonable invasion of the property of plaintiff and the class members and constitutes a private nuisance.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 67.

68. Congress determined, in enacting the TCPA, that the prohibited conduct was a "nuisance." *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc.*, 401 F.3d 876, 882 (8th Cir. 2005).

**ANSWER:** Paragraph 68 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 68.

69. Defendants acted either intentionally or negligently in creating the nuisance.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 69.

70. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 70.

71. Defendants should be enjoined from continuing its nuisance.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 71.

### **CLASS ALLEGATIONS**

72. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of(a) all persons and entities with Illinois fax numbers, (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** WholeHealth Networks admits that plaintiff purports to bring Count IV on behalf of the putative class described in Paragraph 72. WholeHealth Networks denies the remaining allegations of Paragraph 72.

73. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 73 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 73.

74. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 74 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 74.



75. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 75 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 75.

76. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

**ANSWER:** Paragraph 76 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 76.

77. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 77 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 77.

78. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 78.

#### **COUNT V – TRESPASS TO CHATTELS**

79. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** WholeHealth Networks restates and incorporates its answers to Paragraphs 1 through 20.

80. Plaintiff and the class members were entitled to possession of the equipment they used to receive faxes.

**ANSWER:** WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 80.

81. Defendant's sending plaintiff and the class members unsolicited faxes interfered with their use of the receiving equipment and constitutes a trespass to such equipment. *Chair King v. Houston Cellular*, 95cv1066, 1995 WL 1693093 at \*2 (S.D. Tex. Nov. 7, 1995) (denying a motion to dismiss with respect to plaintiff's trespass to chattels claim for unsolicited faxes), vacated on jurisdictional grounds 131 F.3d 507 (5th Cir. 1997).

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 81.

82. Defendants acted either intentionally or negligently in engaging in such conduct.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 82.

83. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 83.

84. Defendants should be enjoined from continuing trespasses.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 84.

### **CLASS ALLEGATIONS**

85. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons and entities with Illinois fax numbers, (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** WholeHealth Networks admits that plaintiff purports to bring Count V on behalf of the putative class described in Paragraph 85. WholeHealth Networks denies the remaining allegations of Paragraph 85.

86. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 86 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 86.

87. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 87 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 87.

88. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 88 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 88.

89. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

**ANSWER:** Paragraph 89 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 89.

90. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 90 consists of legal conclusions to which no response is required. To the extent that a response is required, WholeHealth Networks denies the allegations of Paragraph 90.

91. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

**ANSWER:** WholeHealth Networks denies the allegations of Paragraph 91.

### **AFFIRMATIVE DEFENSES**

For its affirmative defenses to plaintiff's claims, WholeHealth Networks alleges as follows:

1. The complaint fails to state a claim upon which relief can be granted.
2. The claims alleged in the complaint are barred, in whole or in part, by applicable statutes of limitations.
3. The claims alleged in the complaint are barred because plaintiff and the members of the putative class lack standing.
4. The claims alleged in the complaint are barred, in whole or in part, because plaintiff and the members of the putative class provided express permission or invitation to receive the faxes at issue.

5. The claims alleged in the complaint are barred, in whole or in part, by the doctrines of waiver, estoppel, ratification, and/or acquiescence.

6. The claims alleged in the complaint are barred, in whole or in part, by laches.

7. The claims alleged in the complaint are barred, in whole or in part, by the doctrine of unclean hands.

8. The claims alleged in the complaint are barred, in whole or in part, by the failure to mitigate damages.

WholeHealth Networks reserves its rights to plead additional affirmative defenses as investigation and discovery continue.

WHEREFORE, Defendant Healthways WholeHealth Networks, Inc. respectfully requests that the Court:

1. deny plaintiff's request for certification of a class;
2. enter judgment in favor of WholeHealth Networks and against plaintiff; and
3. order such other and further relief as is just and appropriate.

Dated: March 3, 2015

Respectfully submitted,

HEALTHWAYS WHOLEHEALTH  
NETWORKS, INC.

/s/ David C. Layden

One of its attorneys

David M. Greenwald  
David C. Layden  
JENNER & BLOCK LLP  
353 North Clark Street  
Chicago, Illinois 60654-3456  
Telephone: (312) 222-9350  
Facsimile: (312) 527-0484

# **APPENDIX B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

AFFILIATED HEALTH CARE	)	
ASSOCIATES, P.C.,	)	
on behalf of plaintiff and	)	
the class members defined herein,	)	
	)	
Plaintiff,	)	14 C 10247
	)	
v.	)	Judge Kendall
	)	Magistrate Judge Valdez
MEDVERSANT TECHNOLOGIES, LLC,	)	
and HEALTHWAYS WHOLEHEALTH	)	
NETWORKS, INC., and JOHN DOES 1-10,	)	
	)	
Defendants.	)	

**AFFIDAVIT OF IRENE SLUSARENKO**

Irene Slusarenko, on behalf of Affiliated Health Care Associates, P.C., declares under penalty of perjury, as provided for by 28 U.S.C. §1746, that the following statements are true:

1. I have personal knowledge of the facts contained herein.
2. I am the manager of Affiliated Health Care Associates, P.C.
3. Affiliated Health Care Associates, P.C., is the plaintiff in the above-captioned lawsuit.
4. On August 13, 2014, plaintiff, Affiliated Health Care Associates, P.C., received the unsolicited fax advertisement attached as Exhibit A on its facsimile machine from defendants Medversant Technologies, LLC and Healthways Wholehealth Networks, Inc.
5. On August 20, 2014, plaintiff, Affiliated Health Care Associates, P.C., received the unsolicited fax advertisement attached as Exhibit B on its facsimile machine from defendants Medversant Technologies, LLC and Healthways Wholehealth Networks, Inc.



6. Affiliated Health Care Associates, P.C., has never done business with defendant Medversant Technologies, LLC .

7. Affiliated Health Care Associates, P.C., did not consent to receive advertising facsimiles from defendant Medversant Technologies, LLC .

8. Affiliated Health Care Associates, P.C., has never done business with defendant Healthways Wholehealth Networks, Inc.

9. Affiliated Health Care Associates, P.C., did not consent to receive advertising facsimiles from defendant Healthways Wholehealth Networks, Inc.

10. Pursuant to 47 U.S.C. § 227 (b)(3), Affiliated Health Care Associates, P.C., is entitled to receive \$1,500.00 in statutory damages for the unsolicited facsimile advertisements which was sent to it by defendants Medversant Technologies, LLC and Healthways Wholehealth Networks, Inc.

Executed at Chicago, Illinois, on 2-12-, 2015

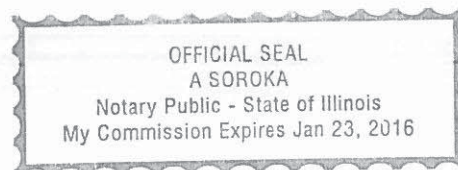
Irene Slusarenko  
Irene Slusarenko, on behalf of  
Affiliated Health Care Associates, P.C.

Subscribed and sworn before me

this 12th day of February, 2015

A. Soroka  
Notary Public

Executed on 02/12, 2015



STATE OF Illinois  
COUNTY OF Cook

SUBSCRIBED AND SWORN TO BEFORE ME  
THIS 12th DAY OF February, 2015  
A. Soroka  
NOTARY PUBLIC

## EXHIBIT A

**PROMAILSOURCE™**  
HIPAA COMPLIANT SECURE EMAIL

August 13, 2014

**RE: Healthways HIPAA Compliance Announcement**

Healthways is excited to announce our partnership with a HIPAA compliant email solution. **ProMailSource™** is an email service, but unlike common email services, it is **secure** (cannot be hacked and protects the privacy of our mutual offices and patients). **ProMailSource™** complies with HIPAA Privacy Rules (now being diligently enforced) that apply to **all** practitioners who treat patients.

This solution allows you to communicate PHI (Protected Health Information) via email. You will be able to communicate with Healthways, your patients, health plans, attorneys, and anyone you currently share PHI with.

**How will ProMailSource™ benefit you?**

- You can use **ProMailSource™** to communicate securely with **all** your patients and other healthcare organizations. **Your patients will appreciate your concern for their privacy.**
- Reduce risk of fines for HIPAA violations of up to \$1,500,000.

Healthways will be utilizing **ProMailSource™** to communicate with our practitioners for Educational Materials, Claims Management Questions, Changes to network policies, Practitioner credentialing updates, Practitioner enrollment questions and more.

Healthways will continue to offer all of our existing communication options. We do find a HIPAA compliant email solution to be the most effective method to share and trade information with our practitioners.

**How to subscribe to ProMailSource™**

To subscribe, visit <https://promailsource.com/healthways> or call 1-855-252-4314.

As **ProMailSource™** is a solution that is applicable beyond Healthways there is a cost to subscribe. **ProMailSource™** is only \$12.95 per month or an annual subscription of only \$120 per year per mailbox.

As a valued Healthways partner, **ProMailSource™** has agreed to waive its \$100 implementation fee if you subscribe prior to September 5, 2014.

Sincerely,

A handwritten signature in black ink that reads "Martie Stabelfeldt".

Martie Stabelfeldt

Healthways WholeHealth Networks, Inc.

Vice President, Physical Medicine Operations

## EXHIBIT B



**PROMAILSOURCE™**  
HIPAA COMPLIANT SECURE EMAIL

August 20, 2014

JAROSLAW SLUSARENKO

Location Code: INFOUS41726696276791

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Sincerely,

Martie Stabelfeldt, Vice President, Physical Medicine Operations  
Healthways WholeHealth Networks, Inc.